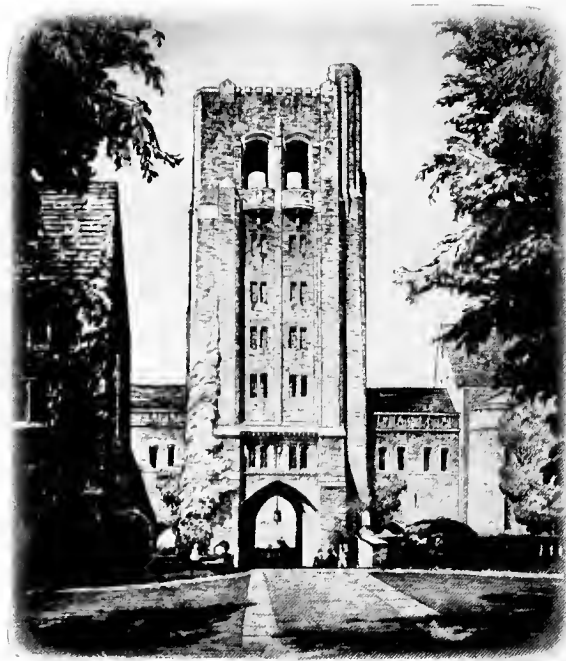


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INTRODUCTION
TO THE
STUDY OF LAW

BY

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BY

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PREFACE.

THE following pages are the result of a desire on the part of the writer to bring together in concise form such information as he has felt would be of particular assistance to students just entering upon the study of law. The student during his earlier efforts seems to have some difficulty in learning where and how to find the law, and to have much greater difficulty in attaining and keeping the legal point of view.

It appears feasible to give the beginner substantial aid at this juncture, by placing before him as simply and concretely as possible certain facts about law books and about the scope and workings of law, which may prove of temporary convenience to him until he has advanced far enough to be able to use the law library with a fair degree of facility, and has become by experience somewhat familiar with the methods of dealing with legal material.

COLLEGE OF LAW, CORNELL UNIVERSITY.
MARCH, 1898.

INTRODUCTION TO THE STUDY OF LAW.

I.

THE SCOPE OF LAW.

Popular Notions of Law.—In the popular mind law is commonly thought of as that which determines what a man may not do, and this idea is evident in such familiar expressions as, “It is against the law,” or “Greater than the law allows.” Law—this barrier that prevents a man doing just as he likes—is associated with policemen, or with a subpoena to serve as a witness, with suing or being sued, with being called to sit as a juror, or is brought to mind as being the profession of judges and lawyers, who always constitute so interesting and conspicuous a part of every community.

Definitions of Law.—Going behind these popular notions that indicate the presence of law, and attempting to discover the actual basis for them, and what the meaning of law really is, we find certain fundamental facts.

Now, these facts may not supply us with an absolutely precise definition of law—a definition that will be universally acceptable, but they will lead us to a plain working statement which may serve as a starting-point.

In every civilized community we find :

1. Rules by which men are expected to order their conduct.

2. That some of these rules of conduct which the community expects a man to observe in his relations with his fellowmen may be followed or not, just as the individual may choose. If he does not observe them, he will, perhaps, experience contempt, criticism, neglect, or loss, from disregarding the customs of the community or some class of it ; or, on the other hand, he may find personal pleasure in disregarding these customs.

3. That there are, however, some rules of conduct of which the state will compel the observance.

4. That the state has provided public courts of justice, to apply those rules of which the state compels the observance.

5. That the state has also provided means for putting in force the judgments and orders of the courts of justice.

From these facts we may say that :

“The law may be taken for every purpose, save that of strictly philosophical inquiry, to be

*the sum of rules administered by courts of justice."*¹

Various definitions have been framed as the result of attempts at a "philosophical inquiry;" for example, "A rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong,"² a definition which with the omission of "commanding what is right and prohibiting what is wrong" is adopted by Kent;³ and "A general rule of external human action, enforced by a sovereign political authority."⁴ These definitions refer only to what is called Municipal law as distinguished from what is called International law. *Municipal law* regulates the intercourse of a state with its subjects and of those subjects with one another; while *International law* is made up of "those rules of conduct in accordance with which, either in consequence of their express consent or in pursuance of the usage of the civilized world, nations are expected to act."⁵ It has been and is contended that International law is not law, for in a dispute

¹ Pollock and Maitland, *History of English Law*, vol. i., p. xxv.

² Blackstone, *Commentaries*, Book I., p. 44.

³ *Commentaries*, vol. i., p. 447.

⁴ Holland, *Jurisprudence*, 5th ed., p. 37.

⁵ *Ib.*, p. 115.

between two nations, each is equally judge of its own cause, and there is no power to compel the observance of the rules other than the power of public opinion.¹ But even if International law does not possess all of the characteristics of true law, the term is, nevertheless, generally accepted for convenience, and with less question, perhaps, because International law seems on the way to become still more like true law.²

Law and Morality.—There are, as was said above, some rules of conduct that courts do not apply, and they are, therefore, not law. And this statement includes many rules that are esteemed to be rules of right conduct as between man and man. In some cases this is because the subject is thought to be too delicate to admit of effective action by the courts. For example, where one person is injured by the negligence of another, and the person who was injured has himself contributed to the injury by negligent acts or omissions of his own, he cannot recover damages. “The law has no scales to determine, in such cases, whose wrongdoing weighed most in the compound that occasioned the mischief.”³

In other cases the reason is that a rule of

¹ Holland, *Jurisprudence*, 5th ed., p. 115.

² See Pollock, *Essays in Jurisprudence*, pp. 35-38.

³ *Railroad v. Norton*, 24 Penn. State Reports, 469.

morality which would be applied by public opinion to the circumstances of some particular case is in conflict with some general rule of law that is applied by courts in all cases of that kind. To illustrate : The law allows general business competition, even if at times such competition results in particular hardship, and in some special instance is regarded by men as being morally wrong. Such would be the case if a wealthy man, having the choice of two sites equally good, should, with indifference to the welfare of a poor widow, establish a business next door to hers, and by underselling ruin her financially. The moral rule that public sentiment applies here does not accord with the general rule that courts apply ; but it is of more importance that a rule of law should be general in its operation than that it should yield to every occasional case of particular moral wrong. In brief, for these reasons it is believed, on the whole, that it is either necessary, or wiser and more expedient, for some matters to be left to the conscience of the parties concerned ; and that the general welfare of society is served better in this way than by attempting to interpose the law to adjust every possible case of wrongdoing.

Operating in this manner, the law not only leaves untouched many cases of moral blame, but in some matters goes to the extent of

compelling one to pay damages when he is not only free from moral blame, but has actually exercised the highest degree of care in his conduct. For example, the law deems that public policy requires a master to be held liable for a wilful wrong committed by his servant, when the act is within the apparent scope of the servant's authority and done in the master's interest ; and this is so even if the master has specifically directed his servant not to do the particular act which caused the injury. So in a case where the driver of A.'s omnibus, acting in the supposed interest of A., wilfully obstructed the omnibus of B., a rival, and in the attempt to get ahead of it, upset it, B. could recover damages from A., even though A. had previously instructed his driver not to race with or obstruct other omnibuses.¹

But it must be remembered that although the law does not, for these reasons, reach the actual moral blame in all possible cases of wrongdoing, the rules that are applied by courts do, nevertheless, reflect generally the moral ideas of the time when, and the place where, these rules of law exist. Ideas of what is right and wrong are not the same at every period nor among all nations. At one time and in some country it may be thought right

¹ *Limpus v. The Omnibus Co.*, 1 Hurlstone and Coltman's English Exchequer Reports, 526.

that slavery should exist, or that the eldest son should inherit his ancestor's estate, to the exclusion of the younger sons ; but when, with the growth of civilization, these ideas change, the law will be found to accommodate itself to the altered conditions. " Social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable ; the societies we are speaking of are progressive. The greater or less happiness of a people depends upon the degree of promptitude with which the gulf is narrowed." ¹

While law is thus a response to the moral sense of the people, it has, moreover, a moral power of its own which it exerts upon every individual. " It is the constant and visible representative of an universal interest outside the individual interest of each man and household. . . . It is well for all men, in the course of perfecting their moral nature, to have ever at hand a grand, visible, and practical witness to the claims of their brother-men, to the subordination of the individual person to the state, and of the subserviency of all individual action and life to the accomplishment of the general aim of humanity." ²

¹ Maine, *Ancient Law*, 3d Amer. ed., p. 23.

² Amos, *Science of Law*, pp. 44, 45.

II.

HOW AND WHERE TO FIND THE LAW.

Importance of the Law Library.—At first the student may be likely to accept as law everything his teachers state to be law, and he may be inclined to take without question all of the statements of the text-books he reads. The instruction given by a capable law teacher, the advice and suggestions of an intelligent and experienced practitioner, the statements of a careful text-writer, are of great value to the student. Their views may be in a high degree clear and accurate, yet the student should bear in mind that neither law teachers, nor practising lawyers, nor text-writers are the authorized repositories of the law. It is in the law library that these repositories are to be found.

Classes of Law Books.—Every law library worthy of the name, whether it be the great library of the associated lawyers in some of our larger cities, or the comparatively scanty collection of the average practitioner in city or country, consists of these four classes of books :

1. Statutes.

2. Reports (of the decisions of the courts of last resort—*i.e.*, courts from which no further appeal can be taken).

3. Digests.

4. Text-books.

A law library sometimes includes other classes of books—for example, Reports of decisions of lower courts, books of citations, law dictionaries, and law magazines ; but the four classes first named are regarded as the necessary working tools of every lawyer. Of these four important classes, however, only two—the Statutes and Reports—are, with one exception to be explained later, the authentic repositories of the law itself.

Statutes.—There are some laws which are enacted by the authorized representatives of the people, and are written down expressly in constitutions, or treaties, or acts of Congress, or acts of the legislature. These rules constitute the statutory law, or, as it is sometimes called, the written law, and are published in the volumes of “ Statutes.”

The statutory law of the federal government of the United States consists of the constitution of the United States, and of the acts of Congress passed, and treaties made, within the authority conferred by the constitution. The statutory law of any of the individual

states consists of the state constitution, so far as it is not repugnant to the United States constitution, and consists, furthermore, of the acts of the legislature, so far as such acts are not repugnant to either the United States constitution or the state constitution.

Public and Private Acts.—Some of these acts are applicable to only a particular person or association, and are called private acts, to distinguish them from public or general acts. An act granting a pension or allowing a personal claim is an example of a private act. The important practical difference is that a court will assume to have knowledge of a public act, while one who seeks to avail himself of a private act must both plead it and prove it.

Form of an Act.—In form, a modern legislative act consists essentially of a statement of what is enacted, to which statement is prefixed the title of the act. A description that has sometimes been given divides the act into three parts: (1) the title, beginning "An act to . . . ;" (2) the preamble, beginning "Whereas . . . ;" and (3) the purview, beginning "Be it enacted . . . ;" but in American legislative acts there is usually no preamble.

Publication of Statutory Law.—After a session of a state legislature all of the statutes passed at that session are published, arranged *chronologically*, each statute numbered as a chapter,

in a volume commonly known as the "Session laws." At intervals all of the *general* acts in effect in the state are brought together, arranged according to *subjects*, and republished, with the federal constitution and the state constitution prefixed. The title given to this general compilation of the statutory law of a state varies more or less among the states. Some of the titles used are : Statutes, Revised statutes, Revised laws, Revised codes, Compiled laws, Compiled statutes, General laws, General statutes, Public statutes, Codes, Annotated codes. The acts of each session of Congress are similarly published at the end of the session, and at the end of each Congress are republished together under the title "Statutes at large," the acts in both publications being arranged *chronologically*. The whole of the federal statutory law is also published under the title "Revised statutes," the arrangement in this publication being according to *subjects*. To find the present statutory law of a state or of the United States, it is, therefore, necessary to consult the "Revised statutes" (or whatever may have the corresponding title in any state), and also the "Session laws" which supplement them. The student should make a careful inspection of these volumes of the statutory law of the United States and of his own state, in order

to understand more fully the form of a statute and the general plan according to which the matter contained in the volumes is arranged.

Reports.—To this brief statement concerning statutory law there must be added the important fact, that statutory law cannot foresee and provide for all the cases that may arise for settlement by the courts, and that a statute itself may be of doubtful character. But while this is so, there does exist a system of rules and principles which courts apply in the absence of any express statutory law capable of settling the matter in dispute, and for the purpose of determining the meaning and validity of a doubtful statute. This system of rules and principles is called the Common law, case law, unwritten law, or customary law, and is deposited in the Reports of the decisions of the courts of last resort.

The acts of Congress and of a state legislature have no validity if they are repugnant to the "fundamental law"—that is to say, to the constitution. One of the most noteworthy features of our system of government—a feature that endows the judiciary with vast authority—is the fact that to the courts is given the power to determine whether a legislative act is contrary to the constitution. In Great Britain, on the other hand, Parliament is all-powerful ; the English courts cannot declare a

legislative act to be unconstitutional. In this country a statute which is understandable, and which, if called upon, will also be able to run the gauntlet of the courts without destruction by being held unconstitutional, will then prevail, to the extent of its provisions, over the Common law.

But while the statutory law does prevail to this degree over the Common law, the domain of the latter is the more extensive. When an issue arises for which no provision has been made by statutory law, or when a statute relied upon is doubtful, the law applicable to the issue thus unprovided for, or to the testing of the doubtful statute, will be found in the Common law. The question will either have been answered already by the Common law in a rule laid down in deciding some previous case virtually like the one under consideration, or if the case in hand presents a new question, the court will then search among previous decisions upon *similar* questions, and, finding the principle upon which those cases were decided, will apply such principle to the new question.¹

Form of a Case.—A case, as it appears in the Reports, usually consists of the following parts :

1. The title, this consisting of the names of the parties.

¹ Hence the name Case law.

2. The head-note or syllabus, in small type, by which the reporter or judge indicates briefly the purport of the case and the rule applied to it.

3. A statement of the form of action and of the manner in which the appeal has been brought up to this higher court.

4. A statement of such facts and previous proceedings in the case as present concisely the matters upon which the court is asked to render a decision. This statement is often not placed here, but is given by the court in its opinion.

5. The names of the attorneys on both sides, with or without an abstract of the arguments presented by them.

6. The opinion of the court.

7. A statement by the court of what disposition shall be made of the case.

Number of Reports.—It is evident, then, that the case law or Common law, and the Reports which are the repositories of that body of law, are of vast importance. The United States and the individual states has each a series of Reports of the decisions of its own court of last resort, and besides these the Reports of the decisions of some of the subordinate courts are also published. The total number of volumes of Reports of American courts is about five thousand, and it is to be noted that these

volumes do not ordinarily contain the opinions in absolutely all of the cases decided, but of those which the judges, or sometimes the official reporters, esteem to be of sufficient importance to make the publication of them advisable. Inasmuch as the parent of our American case law is the Common law of England, the Reports of the English courts are often referred to as evidence of the existence of some rule or principle that should be applied by our courts. This fact makes it necessary that the English Reports should at times be accessible, and adds largely to the mass of case law that the American lawyer has to take into consideration.

Names of Reports.—The Reports of the United States Supreme Court are now known as the “United States Reports,” and those of the highest courts in the several states are entitled briefly after the name of the state—for example, “Alabama Reports,” “New York Reports.” Formerly, however, it was common to name the Reports after the reporter through whom they were issued—for example, Cranch’s Reports (U. S. Supreme Ct.), Gray’s Reports (Massachusetts)—and the name then applied is in most instances still retained, for those particular volumes, even when the later method has been adopted.

From the account given above as to the

manner in which Reports are utilized, it is apparent that courts and lawyers are constantly referring to decided cases contained in previous volumes, or, as it is called, citing authorities. For economy in so doing, the reference to the Reports is almost invariably made by an abbreviated title—for example, the citation “*Jewett v. Stockton*, 3 Yerg. 492 ” directs the reader to the case of *Jewett's Lessee v. Stockton*, at page 492 of vol. 3 of Yerger's Reports of the decisions of the Supreme Court of Tennessee. A list of these abbreviations, with explanations of them, will be found in the second edition of the *American and English Encyclopædia of Law*, vol. i., pp. 102–161 ; Cooley's edition of Blackstone's *Commentaries*, vol. i. ; Bouvier's *Law Dictionary*, title Abbreviations ; Soule's *Lawyer's Reference Manual* ; Chase's edition of Blackstone's *Commentaries*, Appendix ; and occasionally in the catalogues of law-book publishers. Any one who uses law books will find it necessary to know the abbreviations by which the Reports of his own state are cited, and ought to know the abbreviations applied to such of the other Reports as are most frequently cited.

Unofficial Reports.—Besides these official Reports there are series of unofficial, but highly accredited Reports, published by private enterprise. The “ National Reporter Sys-

tem''¹ now includes all current decisions of all of the courts of last resort in the United States, and includes as well the decisions of some of the lower courts. For convenience in this scheme of publication, the territory of the United States is divided into groups of states, and a periodical *Reporter*, appearing at frequent intervals, is devoted to each group. There is thus a *Northeastern*, *Northwestern*, *Pacific*, *Atlantic*, *Southwestern*, *Southeastern*, and a *Southern Reporter*. The system includes also a *Federal* and a *United States Supreme Court Reporter* to cover the federal appellate decisions. This comprehensive plan has done much to make manageable the huge and rapidly increasing bulk of American case law. The *American Decisions*, *American Reports*, and *American State Reports*² form a consecutive series which contains, with useful annotations, all the cases which the editors believe to be of general value and authority, decided in the various *state* courts, from the earliest issue of state Reports down to the present time. The *Lawyers' Reports Annotated*³ have the same general aim as the series last mentioned, except that the *L. R. A.* contain cases no farther back than

¹ West Publishing Co., St. Paul, Minn.

² Bancroft-Whitney Co., San Francisco.

³ Lawyers' Co-operative Publishing Co., Rochester, N. Y.

1888, but do contain decisions of *federal* as well as *state* courts.

The student should now look through carefully the latest volume of the Reports of his own state, and thoroughly familiarize himself from title-page to index with the general plan of the book, and the purpose of each part; and singling out some case, note the parts of which it is made up.

Digests and Text-books.—Having thus considered Statutes and Reports, the authentic repositories of the law itself, we may turn now to Digests and text-books, these two classes of works being of scarcely less practical importance. Digests and text-books have one useful purpose in common, for both serve as pointers to direct the lawyer to any particular part of the law he may be seeking in the great mass of recorded statutes and judicial decisions. Text-books, with the exception of a very few that aim to cover the whole field of law, treat only of some one greater or smaller branch of law, as, for example, Anson on *Contract* or May on *Insurance* (a particular kind of contract); but whether their scope be great or small, they serve to give a view of the law by topics, with citations of the statutes or cases which are authority for the statements made in the book.

Digests.—The Digests are digests of the

cases that have been published in the Reports, and aim to give in brief form, arranged according to topics, the points decided by the cases. What the index of a single volume of Reports does for that volume, a Digest does for a series of volumes of Reports. Each state and the United States has a Digest of its own Reports. These Digests are usually cited by the name of the state—for example, *California Digest*; but sometimes by the compiler's name—for example, *Stanton's Digest* (Kentucky). Besides such particular Digests there is the general *United States Digest*, which covers all the state and federal Reports down to 1888; the *American Digest* (annual bound volumes), published since 1888, of the state and federal decisions; the *General Digest* (at present semi-annual bound volumes) of the decisions of the principal courts in the United States and of some other courts; and periodical Digests of the series that includes the *American Decisions*, *American Reports*, and *American State Reports*.

Text-books—*Reference Text-books*.—So far the use of Digest and text-book is the same, but some text-books have a further value. Text-books may be divided roughly into three general classes. One class, which is by far the largest, has no usefulness substantially different in kind from that of a Digest of the law of England and America upon some special

topic. The authors have not such legal learning and discrimination as to lend the weight of much personal authority to the conclusions they give as a result of their consideration of the cases they cite to support their conclusions. In short, such text-books may be useful for the citations of authorities contained in them, but the careful lawyer does not rely with much confidence upon the opinions of the authors. It is the next class of text-books that is of more importance.

Influential Text-books.—These more valuable books are written by men who are generally recognized by lawyers and courts as learned in the law, and as having power to analyze it and extract its principles. Such works, when referred to in argument, are given careful attention by the profession, and enter seriously into the deliberation of the courts. But the opinions of such writers, highly valued as they may justly be, are, nevertheless, not law, unless the courts adopt such opinions as their own. As examples of the best known of this class of text-books, two works that are classics to the American lawyer may be mentioned, Blackstone's *Commentaries on the Laws of England* and Kent's *Commentaries on American Law*.¹

¹ It is not expedient to give here a selected list of valuable text-books, but in naming a few current works for the sake of illustration, it will probably be quite gener-

We must dwell for a moment upon Blackstone and Kent. Sir William Blackstone's *Commentaries*, first issued in England during the period 1765-69 and in America 1771-72, has ever since its publication held the foremost place among law text-books in the English language. The work covers the entire range of English law, and was the first comprehensive treatise that, by its arrangement and style, made the large subject of which it treats generally accessible. It has been usually the first book put into the hands of an office student, and is used to a greater or less extent in many of our law schools, particularly in the study of the law of real property. The book has had especially great influence in America, because it was published just before the Revolution, and not long before the colonies were beginning to form their state governments, and needed some adequate presentation of the Common law of England, which was, with various modifications, adopted as the law of the new states. There were few books that contained a general presentation of the Common law, and few of the American lawyers had acquired their training in England. These *Commentaries* came, therefore, at an opportune time, and this fact,

ally agreed that Cooley's *Constitutional Limitations*, Bishop's *Marriage and Divorce*, and Dillon's *Municipal Corporations* come well within this influential class.

together with the absolutely high merit of the work, makes it easily understood why Blackstone has been so frequently cited in our law.

Whether it is advisable that Blackstone should nowadays be the first law book to be read by a student depends somewhat upon the student's preliminary training. It is, perhaps, better to select Kent's *Commentaries* as the first of the larger treatises to be put into the hands of the office student, for Blackstone's style, though of rare quality, is somewhat obsolete ; and, moreover, the student might be likely to accept without question Blackstone's views of the origin, nature, and declaration of law, which views are not always in accord with those entertained by later scholarly critics, who are familiar with modern scientific methods of historical research. This much is certain, however, that the student, whether in office or law school, should some time during his course read Blackstone carefully, for much of it is law to-day, and even the much in it that is obsolete now is necessary to explain the present existing American law.¹

After more than a quarter of a century of judicial duties, James Kent, upon his retirement from public office in 1823, was appointed

¹ Among the more recent American editions of Blackstone may be named Cooley's, Sharswood's, and Hammond's, and the variorum edition by Lewis. Chase's

professor of law in Columbia College, New York. Out of his law lectures came his *Commentaries*, the four volumes of which were published during the period 1826-30. While Blackstone aimed to cover the whole field of the law of England, Kent tried to do no less for American law, and with a result equally successful. While Kent's *Commentaries* are not now commonly used for purposes of instruction in our law schools, the work may safely be recommended to office students and the general reader as the first of the great treatises that should be read on American law.¹

Authoritative Text-books.—There now remains a third and still smaller class of text-books to be described. These are even more than influential; they are cited and relied upon as statements of the law itself where direct judicial authority is wanting. This group constitutes the exception previously alluded to when it was stated that Statutes and Reports were alone, with one exception, the only authentic repositories of the law. We here have to do with those earlier legal treatises that were written somewhat abridged edition is perhaps the most useful one-volume edition, and is made especially so for the student by the full appendices and index.

¹ The latest edition is the 14th, edited by John M. Gould, and containing also the notes of Judge Oliver Wendell Holmes, Jr., and Charles M. Barnes, who were earlier editors.

by men learned in the Common law, at a time when the decisions of courts were reported in merely the scantiest way. But these authoritative treatises are cited infrequently by our American courts to-day, and are not likely to be found in the average library of the practitioner. Some examples of the few books that come within this class are Littleton's *Tenures*, the works of Sir Edward Coke and the works of Sir Matthew Hale.¹

Having in mind, then, what has been said of the character and purpose of text-books and Digests, the student should now look through the Digest of the Reports of his own state, and glance through a few text-books, in order to get a preliminary acquaintance with the plan upon which such works are arranged.

Other Classes of Law Books.—In concluding this description of the law library, a brief word must be given to other classes of law books.

Reports of Decisions of Lower Courts, such, for example, as Bosworth's Reports of the decisions of the Superior Court of the city of New York, a court lower than the Court of Appeals, which is the highest court in New

¹ A list of the books of this description, with an estimate of their value, is given in Ram's *Legal Judgment*, Townshend's edition, chap. xii. An account will also be found in Kent's *Commentaries*, vol. i., pp. 499-511.

York State. The decisions of a subordinate court afterward control that court, unless they are overturned on appeal to a higher court. The published decisions of the lower courts are also used for the purpose of persuading the higher court.

Books of Citations.—These are volumes giving an alphabetical list of titles of decided cases, each title being followed by citations of other instances in which the case has been discussed or referred to.

Law Dictionaries.—These, as the title indicates, are works explaining briefly the meaning of technical terms used in law.

Law Periodicals or Magazines.—These files of law journals contain many notes and comments on cases; and also frequent articles of value upon legal subjects, by writers of high reputation and ability in the profession. A key to the wealth of matter contained in these journals is Jones's *Index to Legal Periodical Literature*, in which the contents of one hundred and fifty-eight different sets of law periodicals are indexed down to January, 1887.

Legal Bibliography.—Of the books about law books, special mention must be made of Soule's *Lawyers' Reference Manual of Law Books and Citations* (Boston, 1883). It contains (1) a list of all American Reports, Digests, and Statutes, with notes in regard to the editions and their

peculiarities ; (2) a list of all the law Reports of Great Britain and her colonies ; (3) an index of the editors of Reports, Statutes, and text-books, and of the authors of text-books ; (4) an index of text-books arranged according to subjects.

The Practitioner's Library.—The working library of a lawyer will usually consist of the Statutes of his own state, the Reports of the decisions of the court of last resort in his own state, the Digest of those Reports, and a selection of text-books. If a private law library is more extensive, it is likely to contain, besides these, the Reports of the United States Supreme Court, a Digest of those Reports, the Revised Statutes of the United States, and possibly the Reports of some other state or states, New York and Massachusetts being generally first preferred, because of the long history of their courts, the vast importance of the commercial and other interests that these courts have been called upon to care for, and also because of the uniformly high character and ability of the judges sitting in their appellate courts.¹

¹ Thus we find in the opinion of the United States Supreme Court in *Buck v. Colbath* (3 Wall. 334, 341) this expression : “. . . the Supreme Court of Massachusetts—a court whose opinions are always entitled to great consideration.”

III.

THE OPERATION OF LAW.

How the Common Law Grows.—The external features of the process by which statutory law is enacted are matters of common knowledge. But the life history of the Common law is not generally known outside of the legal profession, and even within the profession parts of its history and way of operation are still questions for investigation and discussion. From the year 1194, the date of the earliest extant plea-rolls in England, down to the latest volume of Reports in the newest state of the Union, extends a succession of records of the Common law. The most recent volume of the Utah Reports has an ancestry that runs back for seven hundred years. Every question to which the Common law is applicable must be decided according to the rules and principles to be found somewhere in these judicial records. These previous cases, in which are to be found the rules and principles to be applied, are called *precedents*. “At the present moment a rule of English law has first to be disentangled from the recorded facts of

adjudged printed precedents, then thrown into a form of words . . . and then applied to the circumstances of the case for adjudication.”¹

For example : A. brings upon his premises and uses a steam boiler. Through no fault of his the boiler explodes and injures B. Must A. pay for the damage ? There is one line of precedents from which is extracted a principle that a man must use due care toward his fellow-men in the conduct of his affairs. A. has used due care, and, therefore, if this principle applies, A. is not liable. But there is another line of precedents from which is drawn a rule that, if one brings and keeps upon his premises certain things that are in their nature likely to escape and do damage, no amount of care will excuse him from liability if they do escape and do damage—for example, if his cattle escape from his enclosure and damage a neighbor's crop. The court, after hearing the opposing sides, considers the arguments, and then decides that the present case does not come within the rule as to the escape of dangerous things, but does come within the general principle requiring only due care, and that, therefore, A. is not liable for the damage done to B.² The steam-boiler case then becomes itself

¹ Maine, *Ancient Law*, 3d Amer. ed., p. 13.

² *Marshall v. Welwood*, 38 N. J. L. (New Jersey Law Reports), 339.

a precedent. The case with its particular facts is added to the many cases that have been decided before, and from this total is, in turn, "disentangled" the rule and the principle underlying it which are to be applied when the next case of like kind arises for settlement.

Adaptability of the Common Law.—The Common law has within itself this power of adaptability ; in order to meet new conditions, it extends or modifies its principles, and so is ever at hand to be applied to all those questions which the statutory law has not foreseen and provided for. This power may be seen in the way the Common law adapted itself to the new circumstances of cases arising out of the introduction of railroads during the first half of the present century, and the same process of adaptation is now going on with reference to the novel circumstances of the questions that have arisen from the recent introduction of the various applications of electricity. The method of operation is thus described by Chief Justice Shaw, of Massachusetts, in the *Norway Plains Co. v. Boston and Maine Railroad* (1 Gray, 267, 268) :

" The liability of carriers of goods by railroads, the grounds and precise extent and limits of their responsibility, are coming to be subjects of great interest and importance to the

community.¹ It is a new mode of transportation, in some respects like the transportation by ships, lighters, and canal-boats on water, and in others like that by wagons on land ; but in some respects it differs from both. Though the practice is new, the law by which the rights and obligations of owners, consignees, and of the carriers themselves are to be governed is old and well established. It is one of the great merits and advantages of the Common law that, instead of a series of detailed practical rules, established by positive provisions and adapted to the precise circumstances of particular cases, which would become obsolete and fail when the practice and course of business to which they apply should cease or change, the Common law consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. . . . When new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle applicable to cases most nearly analogous, but modified and adapted to new circumstances by considerations of fitness and propriety, of reason and justice, which grow out of those cir-

¹ Written in 1854.

cumstances. The consequence of this state of the law is that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them ; the general considerations of reason, justice, and policy which underlie the particular rules of the Common law will still apply, modified and adapted by the same considerations, to the new circumstances."

Growth and Adaptability Illustrated.—The student cannot understand too well the method of operation of the Common law, for by that means he will come nearer to comprehending the nature of the Common law than by learning any of the formal definitions of it that have been given by law writers. It is, therefore, worth while to turn to another illustration, this time taken from the "leading case"¹ of *Munn v. Illinois*, 94 U. S. (United States Supreme Court Reports), 113. The great agricultural states of the West and Northwest send their grain to Chicago, there to be transshipped and forwarded by rail or water to the Atlantic coast, and part of it thence to Europe. This business grew to immense proportions, by reason of the advantageous position of Chicago and from other commercial causes. The con-

¹ A "leading case" is the technical name given by lawyers to a case which marks the direction in which some doctrine of the law subsequently tends.

ditions necessitated means for handling and storing the grain at that point, and storehouses or elevators had been erected as the trade grew ; but the elevators were few in number, and these were controlled by still fewer firms, that fixed the elevator charges at their own discretion. Thus they might not only exact a fair charge, but also levy a tribute upon the whole of this vast grain traffic. In 1872 the Illinois legislature passed an act which fixed the amount beyond which the elevator owners were not to be allowed to charge for handling the grain. The owners contested the law on the ground that it was an unlawful interference with their private business, and asserted that the act was invalid because it was contrary to the fourteenth amendment of the United States constitution, which says that no state shall " deprive any person of life, liberty, or property, without due process of law." They contended that if the legislature of a state could, without the consent of the owner, arbitrarily determine the price which the owner should be permitted to receive for the use of his property, it could deprive him of his property as effectually as by its confiscation or destruction. The question, therefore, to be settled by the United States Supreme Court was as to the construction to be put upon this clause of the constitution, and whether the clause was ap-

plicable to the circumstances of the present case.

It was clear and conceded on both sides that while, on the one hand, a person cannot be deprived of his property without due process of law, yet, on the other hand, our constitutions expressly state or necessarily imply, and it is a fundamental principle of the Common law, that, even though pecuniary loss may ensue to individuals, some regulation of persons and property is absolutely essential to the existence of any civilized state. For example, any state must have the right to tax, and to exercise what are called its "police powers," in order to secure the peace, safety, and health of the community at large. These police powers are exercised to prohibit or limit the sale of liquors ; to suppress a nuisance in the use of private premises ; to compel the use of safety appliances on railroads, and are called into operation in countless other ways.

But can these police powers be used to the extent of reasonably limiting the compensation a man may receive for the use of his private property, and if so, where shall we find precedents to warrant us in saying that this is the law? The great principles of liberty, and its regulation, as embodied in our constitutions, were established in England by our ancestors, and, therefore, when a statute is challenged as being

contrary to the constitution, and the meaning of some unsettled clause in the constitution has to be discovered, we may look to the principles of the Common law for a solution of the difficulty. If it is found that the principles of the Common law of England authorized, under some circumstances, the public control of private property to the extent of regulating compensation for its use, it can be determined that our constitutions which contemplated the existence and continuance of those principles in this country, therefore contemplated the existence of the right to regulate compensation for the use of private property, under like circumstances, in this country.

Turning, therefore, to the precedents of the English Common law, there is found the following statement in Lord Hale's treatise *De portibus maris* (1 Hargreave's *Law Tracts*, pp. 77, 78), written over two hundred years ago : " A man, for his own private advantage, may in a port town set up a wharf or crane, and may take what rates he and his customers can agree. . . . If the king or subject have a public wharf unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, . . . or because there is no other wharf in that port, as it may fall out where a port is newly

erected, . . . the duties must be reasonable and moderate. . . . For now the wharf and crane and other conveniences are *affected with a public interest.*"¹ If, then, any circumstances could exist to affect the elevators "with a public interest," the Illinois legislature did not, in reasonably regulating the elevator charges, act contrary to the intent of the constitution. It was held that the elevators were affected with a public interest, and thus this doctrine declared in *Munn v. Illinois* is of immense importance in these days of business combinations. The case affords a striking example of the manner in which the principles of the Common law adapt themselves to the needs of society under ever-changing circumstances.²

Adherence to Precedents (Stare Decisis).

—At first sight it may seem strange that a court should thus cling to precedents in rendering a decision, but upon second thought the reasons for this practice become apparent. First, there is in all men an instinct to follow custom, to do what has been done before.

¹ This reliance upon the citation from Lord Hale's treatise affords an interesting illustration of the statement (*ante*, pp. 23, 24) that there are a few treatises which have all the authority of judicial decisions.

² The case also serves to illustrate some of the relations between statutory law and Common law heretofore mentioned, *ante*, pp. 12, 13.

Second, courts should not, any more than other sensible human beings, neglect to study the accumulated experience of their predecessors. Third, and of especial importance in the administration of law, this practice conduces to *certainty*, a quality which is in the highest degree essential if the law is to be obeyed. "If it is known that a decision, once arrived at, will be followed in the like case in time to come, the uncertainty of men's affairs is diminished and occasions of dispute taken away. The same questions must not be agitated forever." ¹

Therefore, we find the court saying in *Yale v. Dederer*, 68 N. Y. 329, 335: "It is better to adhere to a rule of doubtful propriety, which has been deliberately settled for a long series of years and repeatedly reiterated by all the courts of the state, than, by overturning it, to weaken the authority of judicial decisions, and render the law fluctuating and uncertain. . . . There is every reason for referring the question to the legislative power to determine definitely what rule shall finally prevail." The doctrine which requires courts to follow precedents is

¹ Pollock, *Essays in Jurisprudence*, pp. 50-57. This method of growth from precedents is aptly expressed by Tennyson:

"A land of settled government,
A land of just and old renown,
Where Freedom slowly broadens down
From precedent to precedent."

termed *stare decisis* (to stand by precedents). The following brief opinion, in its entirety, given in the case of *Puffer v. Orange*, 122 Mass. 389, affords a very simple example of a statement of rules, based on precedents, with citations of the precedents and an application of the law to the facts of the case in hand :

“ GRAY, C. J. The law which governs this case is well settled by the decisions of this court. A town is bound to erect barriers or railings where a dangerous place is in such close proximity to the highway as to make travelling on the highway unsafe. *Stevens v. Boxford*, 10 Allen, 25 ; *Babson v. Rockport*, 101 Mass. 93 ; *Britton v. Cummington*, 107 Mass. 347. But it is not bound to do so to prevent travellers from straying from the highway, although there is a dangerous place at some distance from the highway which they may reach by so straying. *Sparhawk v. Salem*, 1 Allen, 30 ; *Adams v. Natick*, 13 Allen, 429 ; *Murphy v. Gloucester*, 105 Mass. 470 ; *Commonwealth v. Wilmington*, 105 Mass. 599 ; *Warner v. Holyoke*, 112 Mass. 362. In the case at bar there was no dangerous place and no defect or want of sufficient railing, where the plaintiff's horse left the highway, and the dangerous place where the accident happened was reached by passing some distance over a level space, and was at a spot not in or contiguous to the highway, and which

the town was not bound to guard by a railing."

It is obvious that the Common law doctrine of *stare decisis* would, unless softened in its operation, have the effect of making the law inflexible and incapable of meeting the needs of society under new or changed circumstances. This difficulty and other obstacles in the Common law have been overcome in three ways : (1) by *Judicial interpretation*, (2) by *Equity*, (3) by *Legislation*.

Judicial Interpretation.—By judicial interpretation is meant the court's way of looking at the case before it for decision, and at the cases that are brought forward as precedents. Upon the way of looking at precedents will depend the doctrine which is extracted from them, and upon the aspect in which the facts of the case to be decided present themselves depends the application of this or that doctrine which has been extracted from the precedents. For example, if, in the case of *Munn v. Illinois*, the court had adopted a different interpretation of the precedents urged upon it, there would have resulted a conclusion quite different from that which was reached ; and, in fact, there was a strong dissenting opinion by one of the judges, who did not agree with the judicial interpretation of the precedents as adopted by the majority of his fellow-judges.

The Function of Judges.—The most general assurance we have that courts apply the right principles is in the fact that the judges act consciously or unconsciously under the influence and in the spirit of the time in which they live. A question of law presents itself when we ask what rule shall be applied to a given state of facts. Usually the existence of some of the facts is itself in dispute, and if so, there must first be a *trial* to determine, by judge or jury, what the facts of the case really are. After the facts are ascertained, or if, as sometimes happens, the parties are agreed as to the facts, then follows the inquiry as to what rules or principles should be applied to those facts. And here comes in the great function of the judge ; for he must decide. If he is inefficient and applies the wrong principle, he creates confusion in the law, and does harm to society ; but if, possessing the technical learning of a lawyer, united with practical wisdom, he applies the right principle, he helps society to develop along the line of its best hopes. Judge Oliver Wendell Holmes, Jr., says of Chief Justice Shaw, of Massachusetts : “ The strength of that great judge lay in an accurate appreciation of the requirements of the community whose officer he was. Some, indeed many, English judges could be named who have surpassed him in accurate technical

knowledge, but few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him, in the language of the late Judge Curtis, the greatest *magistrate* which this country has produced."¹

The Critical Study of Cases.—The professional ability of lawyers in arguing a question of law, and of judges in deciding it, is thus chiefly occupied with a critical study of previous cases, in order to determine whether the previous cases do really support some alleged doctrine, and, even if so, whether the facts of the case at bar are not so materially different from those of the previous cases as to make such doctrine inapplicable to the present case.² In studying any previous case, the chief precept to be borne in mind is that the court, in deciding it, administered law to the facts of that case alone. It did not decide what law would have been applied if the facts had been different, or what law it would apply to some supposed facts that might arise in the

¹ *Common Law*, p. 106.

² The method of instruction in many of our law schools is based more or less upon the idea that proficiency in the analysis of cases is an important part of the training of the student, and a number of volumes of selected cases in various branches of the law have been published in pursuit of the plan. A valuable aid is Wamhaugh's *Study of Cases* (2d ed., Boston, 1894).

future. *A previous case has absolute authority only to the extent of the doctrine necessarily involved in deciding it as the court did decide it.* The doctrine of a previous case is to be found in, or gathered from, the opinion of the court ;¹ but the opinion is likely to contain also many other matters, as, for example, statements by way of introduction ; a review of some previous cases that have very remote or no bearing upon that case ; a general essay upon some topic of the law, and speculations as to what law might be applied under other circumstances. Any such statements as are not necessarily involved in the doctrine actually held in that particular case are not of binding authority in deciding future cases, and are termed *dicta* or *obiter* or *obiter dicta*. Thus we find a court saying : “ . . . When that question arises upon an actual case—not upon one that may come up at some future time—we will endeavor to meet and settle it, but until that time it is obvious that we would be exceeding our powers were we to consider it. Any expression of opinion under such circumstances, upon the abstract points, would be clearly *obiter*, and would amount to nothing more

¹ In Nebraska, however, the head-note or syllabus must be considered, for it is a rule there that the members of the court are bound only by the points as stated in the syllabus of the case. *Holliday v. Brown*, 34 Neb. 232, 234.

than the views of the judge delivering the opinion ; it would not have the force or effect of a judgment binding upon the court."¹ Although dicta are not of binding authority in deciding future cases, yet they may be of service in persuading a court, especially when they are the utterance of some judge who has a high reputation. Our federal Supreme Court and many of our state courts have had, and now have some strong judges whose dicta possess this extra influence ; from among those not now living one may name Shaw, of Massachusetts ; Kent, of New York ; Gibson, of Pennsylvania ; and Marshall, of the United States Supreme Court.

The study of cases thus really resolves itself into what is called " distinguishing the cases," and in most instances requires the power of a clear mind specially trained to the exercise of keen discrimination. A short and not complicated illustration of " distinguishing a case" is found in *Commonwealth v. Newton*, 123 Mass. 420, the whole of the opinion being as follows :

" MORTON, J. The search-warrant in this case authorized the officer to enter and search the house occupied by Michael Connors. It did not justify him in entering the tenement occupied by the defendant. If, therefore, the closet which the officer insisted upon search-

¹ *Gunn v. Central R. R.*, 74 Ga. 509, 512.

ing was, in fact, a part of the defendant's tenement, and was not used by Conners as a place of keeping intoxicating liquors, the officer had no right to enter it, and the defendant had the right to resist his entry, using reasonable force. The fact that the officer believed that the closet was in the occupation of Conners cannot affect the rights of the defendant. The case differs from *Commonwealth v. Leddy*, 105 Mass. 381, because in that case the apartment searched by the officer was occupied by Galligan, the person charged in the complaint and warrant, for the illegal keeping of intoxicating liquors, by the consent of the defendant. This apartment, therefore, was a part of the tenement occupied by Galligan, and the search-warrant included it."

Erroneous Decisions.—An effective safeguard against the possibility of a wrong decision by the court is secured by constituting several judges the appellate court of last resort, and requiring the concurrence of a majority of the judges in any decision rendered. But even the wisest of courts will err occasionally, and by the time a similar case arises again, it may have become evident that a wrong principle has previously been applied. Under such circumstances the courts do, in comparatively rare instances, squarely overrule themselves. In *Hall v. Corcoran*, 107 Mass. 252, we find the

court saying : " The respect due to the opinions of those courts, and to the doubts which have always been entertained by the bar of this Commonwealth of the correctness of the decision in *Gregg v. Wyman*, has induced us to reconsider the question, and upon full consideration we are unanimously of opinion that it was erroneous and must be overruled." Almost always, however, a court, instead of directly overruling its previous decision, keeps, at least nominally, within the principle of *stare decisis*, and adheres, or pretends to adhere, to its former decision, but at the same time limits closely to the facts of that previous case the doctrine which has since been found to be objectionable. In brief, the court " distinguishes the cases" more sharply than usual, and by a succession of such limitations every time the objectionable case is appealed to as authority by a lawyer in argument, the unsatisfactory doctrine is eaten away until it becomes a mere remnant. Thus the New York Court of Appeals, referring to one of its previous decisions, that in the case of *Ryan v. N. Y. C. R. R.*, says : " The *Ryan* case (35 N. Y. 210) should not be extended beyond the precise facts which appear therein. Even if correctly applied in that case, the principle ought not to be applied to other facts." ¹ And

¹ *Frace v. N. Y. L. E. & W. R. R.*, 143 N. Y. 182, 189.

the United States Supreme Court in *Milwaukee and St. P. Ry. v. Kellogg*, 94 U. S. 469, 474, says of the *Ryan* case, that it has "been the subject of much criticism," and "it may, perhaps, be doubted whether it has always been quite understood." The process is likewise indicated by this extract from the opinion in *Anderson v. Spence*, 72 Ind. 315 : "We confess, however, that it seems to us there was a real conflict between the doctrine of *Green v. Cresswell* and that of *Cripps v. Hartnoll*, and that the distinction attempted to be made by the latter case was simply the effort to get rid of an unsound doctrine without expressly overruling it."

Legal Fiction.—In the earlier days of the Common law its rigor was modified at times by resort to a ruder method of interpretation, in order to bring some new case within an existing principle. This method was by "legal fiction," and many such fictions were adopted. As an example, though not one of the earliest : "It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time is really his servant, acting within the general scope of his authority. Probably master and servant are 'feigned to be all one person' by a fiction. . . ." ¹ In

¹ Holmes, J., in *Dempsey v. Chambers*, 154 Mass. 330, 332.

one of the earliest cases on this point (end of the seventeenth century) this fiction is stated in another way : “ *It shall be intended* that the servant had authority from his master, it being for his master’s benefit.”¹ But the real reason, and without resort to fiction, is stated by Chief Justice Shaw : “ This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another.”²

Equity—*Historical Sketch*.—Equity was a second way by which the hardship arising from the rigor of the Common law was overcome. The earlier recorded Common law in England was chiefly concerned with the *writs*, by which a person against whom there was a complaint was brought into court to meet his adversary. These writs, summoning a man to appear, were issued in the king’s name, and drawn up in the king’s Chancery, an office which did any writing that was to be done in the king’s name. The writs told the person summoned a good many particulars of the matters alleged against him. Gradually Chancery came to keep on hand various blank forms of writs, from which the complainant was to

¹ *Turberville v. Stampe*, 1 *Ld. Raymond*, 264.

² *Farwell v. B. & W. R. R.*, 4 *Metcalf*, 55, 56.

choose the one that would fit his cause of action. The Chancery sold the writs, some being obtainable, as a matter of course, by paying the fixed price, and others being had only by special bargain. But it was seen that if the king could, through his Chancery, invent new writs, he could in this way devise new remedies, and therefore new rights. As the system could thus be used to create new laws, without the approval of Parliament, the practice met with a check, and it then came to be a settled doctrine that no new writ could be introduced except by statute. From the time of Edward I., in the thirteenth century, it may be said that Chancery had no longer independent power to issue new kinds of writs, and it therefore followed that if the complainant could not bring his cause of action within some one of the writs already existing and for sale in Chancery, he would be without remedy in the Common law courts. "And thus the register of writs in Chancery becomes the test of rights and measure of law. Then round each writ a great mass of learning collects itself. He who knows what cases can be brought within each formula knows the law of England. The body of law has a skeleton, and that skeleton is the system of writs. Thus our jurisprudence took an exceedingly rigid and permanent shape ; it became a commentary on formulas. It could

still grow and assimilate new matter, but it could only do this by a process of interpretation which gradually found new, and not very natural meanings for old phrases. . . . This process of interpretation was too slow to keep up with the course of social and economic change, and the Chancery had to come to the relief of the courts of law by making itself a court of equity.”¹

In the thirteenth century the chancellor rarely performed any really judicial work, for the issuing of writs was not strictly of that character,² but in the fourteenth century petitions of complainants, who alleged that they could not get redress elsewhere, found their way to him, though the wrongs of which they complained might be those that were dealt with by the Common law. As an excuse for going to him, the king's chief minister, the complainants alleged that their opponents were powerful, and that they themselves were too weak to get justice at Common law. Men had come slowly to think that the chancellor had a court of his own, though its jurisdiction was the same in some respects as that of a Common

¹ Professor F. W. Maitland, in Traill's *Social England*, vol. ii., pp. 37, 38. See also Pollock and Maitland's *History of English Law*, vol. i., pp. 173-175.

² Pollock and Maitland, *History of English Law*, vol. i., pp. 129, 130, 175, 176.

law court. He was, however, gradually excluded from the field of the Common law, for the fact that its delays were many and its juries might be purchased was not to be allowed to deprive it of jurisdiction over matters that rightfully belonged to it.

But though the chancellor was gradually excluded from adjudicating upon Common law cases, the fact that the Common law courts were confined to the limited number of writs made supplementary remedies necessary, and the application of these remedies was undertaken by the chancellor. The Chancery thus came to have a jurisdiction of its own, establishing itself as a Court of Equity alongside the Common law courts, and hearing causes in which those courts had no remedy to offer. The first great step in the assumption of such jurisdiction was in compelling trustees to do what in good conscience they ought to do. In the second half of the fourteenth century many of the great landowners were seeking to evade certain burdens and restrictions imposed upon the use of their land. To do this, they conveyed the land to other persons with an understanding as to the use and avails of the land. But if a person to whom land was thus conveyed with such an understanding, afterward refused to carry out the trust he had undertaken, the Common law would not compel

him to do so, for by the Common law he had become the legal owner. The chancellor, however, would undertake to see that the trustee did what he was honorably bound to do, according to the arrangement between the parties. From time to time the jurisdiction of Chancery was enlarged until it succeeded in covering many of the spots left bare by the Common law.¹

Present Scope of Equity.—Equity for a long time remained more or less free with its remedies. It did not consider itself very strictly bound by its previous decisions, for in the sixteenth century its decisions were very rarely reported, and even in the seventeenth century it was said that equity was a “roguish thing” with no constant measure.² But a tendency to follow its own precedents more and more strictly became manifest, the decisions of the court were more fully reported, and during the chancellorship of Lord Eldon, in the first quarter of the nineteenth century, the structure of equity was fully formed. Thenceforward it ceased to adopt new principles, and applied only those it had previously established; it followed its own precedents with the same care

¹ Professor F. W. Maitland, in Traill's *Social England*, vol. ii., pp. 485-489.

² Authorities collected and quoted in Ram's *Legal Judgment*, Townshend's Amer. ed., pp. 64, 66.

and respect that the Common law courts show to the precedents of the Common law.¹ Equity to-day does not profess to supplement the Common law in any other way or to any further extent than it can find authority for in equity precedents.

Remedies in Equity.—One of the equitable remedies, the control of trustees, has already been mentioned. Other examples of equity, as distinguished from Common law jurisdiction, appear in the difference between the Common law and equity remedies for breach of contract and for injury to property. For a breach of contract the remedy to be had in a court of Common law is money compensation, while a court of equity, in certain cases where the money damages, which could have been recovered in a court of Common law, would not have been an adequate remedy, will compel the person who has broken the contract to specifically do the thing he had promised to do. In a court of Common law the remedy for injury to property is money compensation for the damage actually done, while a court of equity will grant an injunction to prevent the commission of the injury.

Equity in the United States.—Our states that adopted the English Common law also adopted sooner or later, fully or partially, the English

¹ Maine, *Ancient Law*, 3d Amer. ed., p. 66.

equity system, or else allowed equity jurisdiction to their Common law courts.¹

As we have seen, the ancient rigidity of the Common law has been largely overcome, because with the great accumulation of Common law precedents courts can make the Common law elastic by the process of judicial interpretation, and also because there was established a Court of Equity or Court of Chancery, which, though it has now ceased to adopt new principles, can likewise be kept elastic by the process of judicial interpretation of equity precedents.

Legislation.—And there is yet a third way by which the inadequacy of the Common law is met—by legislation. This method is more familiar. If a doctrine of the Common law becomes objectionable, legislation can modify or abolish the doctrine ;² if judicial interpretation and equity have still left a gap, legislation can step in and fill it ; but in both instances, of course, only so far as the federal and state constitutions permit. Such an act is, however, rarely applicable to those cases which arose before its enactment. A statute usually takes effect from the date of its enactment, or it may be provided that it shall go into effect a designated time after its enactment ; but an

¹ See State Courts, *post*, pp. 75, 76.

² See the quotation from *Yale v. Dederer*, *ante*, p. 36.

act passed to affect prior cases, termed a *retrospective* or *retroactive* law, is usually discouraged by the courts when called upon to interpret it, even if the act is not absolutely void as having been expressly forbidden by the constitution. The United States constitution prohibits a state from passing any act that shall impair the obligation of an existing contract or any act that is *ex post facto*.¹ Further than this, some of the state constitutions go beyond the federal constitution and prohibit the passing of retrospective laws generally. But where such laws are permitted, they are merely allowed in order "to confirm rights already existing and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable and conducive to the general welfare, even though they might operate in a degree upon existing rights, as a statute to confirm former marriages defectively celebrated, or a sale of lands defectively made or acknowledged." ²

Codification.—Although we have been con-

¹ An *ex post facto* law is a retrospective law relating to criminal matters, and makes an act punishable in a manner in which it was not punishable when it was committed. *Calder v. Bull*, 3 Dallas, 386.

² Kent's *Commentaries*, vol. i., pp. 455, 456.

sidering legislation as a means of curing any inadequacy of Common law remedies, it is proper to add here that it is a serious subject of controversy, whether legislation should not be resorted to for the purpose of making the case law more manageable. Because of the immense accumulation of precedents, and the ever-recurring necessity of disentangling from them a rule or principle to be applied whenever a case is to be decided, it is being generally discussed whether it would not be better, as far as possible, to extract and formulate, once for all, in plain language the main rules that are now embedded in previous cases, and adding these rules to the present existing statutory law, have the legislature enact the whole in the form of well-arranged *codes*. The important ends sought in thus codifying the law are "to get rid of a certain amount of antiquated material, mostly feudal, and the shells of obsolete theories that still stick in the law, to develop and further apply some sound and valuable principles already admitted into the law, but not yet carried out and applied as fully and logically as they advantageously might be, and to so arrange the whole as to make it as easy as possible for persons who have occasion to do so to find out what the law is upon any given point."¹ Codification

¹ Terry, *Anglo-American Law*, p. 607.

of the common law has not yet become general, and it has strong opponents, who argue that litigation would not thereby be decreased substantially ; that if the rules are formulated and fixed in statutes, much of the flexibility of our law would be lost, and the gain in certainty would not be sufficient to compensate for the loss in adaptability ; and, moreover, the codified rules would themselves have to undergo judicial interpretation.¹

Adoption of the English Common Law in the United States.—We have seen the method in which the Common law grows and operates in this country at the present time, and it has been previously mentioned that the succession of judicial records marking the line of its growth now extends back for seven hundred years. That which makes the continuity of this line is the fact that each of our states² has adopted, as its Common law, the Common law of England so far as it is suited to our circumstances. The English colonists in America

¹ California and some other states have undertaken to codify the entire body of their law ; many states have codified that part relating to procedure in the courts ; New York has codified those parts relating to procedure and crimes, and has recently adopted a code of the law relating to negotiable instruments.

² Except Louisiana, whose general or Common law is, like that of the countries of continental Europe, embraced in a code which follows the Roman law.

brought with them the Common law of England as it existed at the time of their colonization. It continued to be the Common law of the colonies ; and in each of our states, whether formed out of territory included in the English colonies, or formed out of territory acquired otherwise than by English colonization, the courts have assumed or the constitutions or legislatures have declared that the English Common law is the Common law of the state, so far as adapted to the needs of the state.

Inasmuch as the Common law is subject to change and growth, it may be asked of a state : You adopted the Common law of England, but you adopted it as it existed at what period of its life ? Some authorities answer that it was the Common law as it existed at the time of the first permanent settlement in 1607 ; others, that the date is that of our independence in 1776 ; others, that each state may fix the date for itself.¹ In any event, since 1776 the Common law that is binding in anyone of our states is not the Common law as it is administered by English courts, but the Common law as it was adopted by that state.²

Certain English *statutes* enacted prior to the

¹ Hammond's *Blackstone*, editor's note, vol. i., pp. 283, 284.

² *Ib.*, p. 284.

Revolution are, so far as applicable to our conditions, deemed to have been taken over into and become a part of our *Common law*.

Modification of the English Common Law in the United States.—The reservation that the English Common law is adopted by each of our states only so far as it is applicable to the circumstances of that state is an important matter. It follows that the Common law of one state is not that of another ; each has its own Common law ; each has its own precedents, and is not bound by the decisions of another. The Common law as adopted by each state is interpreted by that state for itself. We have as many Common law *jurisdictions* (as they are termed) as there are states and territories. In a new state the court of last resort will, before it has accumulated many precedents of its own, turn frequently to the decisions in England and the older states for reasons helpful to a conclusion in the settlement of the many questions new to that court ; and even in an older state, when a case comes up presenting a new question (known as a “ case of first impression”), the court is likely to turn for the same purpose to the precedents in other jurisdictions. Such outside decisions are a valuable aid, but nothing more, in helping a court to declare wisely the Common law of its own state ; they are not of binding authority.

Thus it happens that the Common law of one state differs in many of its rules from the Common law of another state or of England, though it remains in its main features and in the process of its growth the same in all jurisdictions.¹

The following illustration shows how the Common law may vary in different jurisdictions. There is an English Common law rule, adopted by most of our states, that an owner of cattle is liable, in any event, if they escape and do damage. It is the duty of the owner to keep them in or else pay for the injury they do. But in Colorado, where the grazing interests have hitherto been of vastly greater importance than tilling the soil, the courts have refused to adopt the English Common law rule, since it is not suited to the conditions in that state. There the duty is put upon the farmer to fence in his crops, unless he is willing to suffer damage from the herds, instead

¹ The United States or federal courts have power to act in cases involving the federal statutory law and treaties, and such other powers as may have been allowed to them under the limitations of the federal constitution. As to the existence of a federal *Common law*, as distinguished from the Common law of the several states, and as to its scope, a matter which has not yet been wholly determined, reference may be had to Lee's "Is There a Federal Common Law?" (*Northwestern Law Review*, vol. ii., p. 200), and Rand's "Supreme Court in Judicial Legislation" (*Harvard Law Review*, vol. viii., p. 328) and to the authorities there cited.

of being upon the owner of cattle to keep his cattle enclosed, unless he would subject himself to paying such damage as they may do if they escape (*Morris v. Fraker*, 5 Colo. 425); and the court in a later case (*Nuckolls v. Gaut*, 12 Colo. 361) says: "The case cited¹ holds that in the particular mentioned, the principle of the common law is inapplicable here. If since that opinion was written (about ten years ago) the circumstances and conditions have so changed as to justify a return to the Common law rule, the legislature should so declare. Until such legislative declaration is made, we shall apply to doctrine of *stare decisis*." So, too, in some of our Western states, where water is extensively used for mining and irrigation, the English Common law rules as to water rights have been considerably modified, as not being adapted to the conditions existing in those communities.²

Historical Sketch of the Common Law in England.—We have considered the manner in which the Common law pursues its way in this country at the present time; we have followed it back, and found that it came to us from England; and we will now, passing over into England, notice briefly its course there down

¹ *Morris v. Fraker*.

² See *Hoffman v. Stone*, 7 Cal. 46, 48, and note in 43 *American Decisions*, 279.

to our colonial period, when it reached the condition in which it came to us.

Origin of the Common Law in Custom.—The Common law of England had its foundations in the customs of the Germanic tribes that accomplished the Anglo-Saxon conquest of Britain. Any body of persons living together in a community, no matter how primitive, must of necessity sustain relations to one another, and they must have some understandings, silent or express, of such relations. In early times it was custom that showed from generation to generation what those understandings were. There is in man an instinct to do an act because it has been done before, and by repetition the act comes to seem the natural and proper thing to do.

The Anglo-Saxon courts having been in their character local courts of the people, would naturally find in the local and long-remembered customs the measure for the administration of justice. Thus it was that that part of the law of England which is not statutory law came to be called "customary law;" and though at the present day we do not conceive of the Common law as being custom, yet even down to Blackstone's time the "Common law of England" was thought of as being the "common custom of the realm." The term "Common law" did not come into frequent

use until the time of Edward I.¹ For example, in the charter of Henry I., at his coronation, he says: "And all the evil customs by which the realm of England was unjustly oppressed will I take away, which evil customs I partly set down here."

The King's Court and the Customary Law.—After the Norman conquest of England in the eleventh century, the country became covered with small local courts, for, besides the old English local courts which still continued to exist, the lords held courts of their own, known as courts baron; "the great old tribal customs were breaking up into multitudinous petty customs."² But with the reign of Henry II., in the latter half of the twelfth century, began the process whereby the king's court—administering justice by him or in his name—was to overcome and gather to itself the jurisdiction scattered among local courts. Prior to the time of Henry II. the king's court had been chiefly a court for great men or great causes, but he opened it to all his subjects. He made it a court of professional judges, and sent them frequently over the country to administer justice in his name. He issued ordinances which were known as *assizes*, for their instruction, and these assizes introduced new remedies

¹ Pollock and Maitland, *History of English Law*, vol. i., p. 156.

² *Ib.*, p. 84.

which worked themselves into the fabric of the Common law.¹ With the extension of his judicial functions, there was developed the scheme of *writs*, by which the king's justice was invoked. The writ was a mandate, in the name of the king, which issued at the instance of a complainant to bring his adversary into court. Various kinds of writs were kept in hand for various kinds of cases, and sold to complainants, and by the end of the reign of Henry II. the custom of the king's court—the early Common law—had begun to assume the form of the judges' commentary upon these writs,² a matter that in another connection has already been mentioned.³

By the beginning of the reign of Edward I., in the second half of the thirteenth century, the result of the expansion of the king's court upon the local courts had been the establishment of the English *Common* law, out of such customs as were common to the realm, as distinguished from such customs as were merely local.⁴ "There is reason to think, as a matter of history, that in the critical period when the

¹ Professor F. W. Maitland, in Traill's *Social England*, vol. i., pp. 408, 409.

² Pollock and Maitland, *History of English Law*, vol. i., pp. 129, 130.

³ *Ante*, pp. 46, 47.

⁴ Greer, "Custom in the Common Law," *Law Quarterly Review*, vol. ix., p. 164.

foundations of English law were assured, from the reign of Henry II. to that of Edward I., the king's judges had no small power of determining what customs should prevail and be received as the 'custom of the realm,' and that they exercised it freely."¹

At the end of this critical period it is said that "on the whole, the local variations from the law of the land are of no great moment. . . . The strong central power has quietly subdued all things unto itself. No English county ever rebels for the maintenance of its customary law."² From the time of Edward I. the king's court was differentiated into three courts that administered the Common law—the King's Bench, the Common Bench or Common Pleas, and the Exchequer. These courts continued their separate existence until by acts of Parliament, in 1873 and 1875, they were, together with all the other superior courts of law and equity in England, united into one Supreme Court of Judicature.

Present Relation of Law to Custom.—Just here we may turn aside to ask what has been the relation of custom to the Common law since the earlier period of which we have been speaking. The question may be answered by

¹ Pollock, *First Book of Jurisprudence*, pp. 240, 241.

² See Pollock and Maitland, *History of English Law*, vol. i., pp. 163-165.

recurring to what has previously been said about the process and purpose of judicial interpretation, and by adding to what was there said the following quotation from a tribute recently paid by James C. Carter, a leader of the New York bar, to a former chief judge of the New York Court of Appeals : " His great mastery of the reasons upon which the law is founded and his vast experience have enabled him to perceive and appreciate the almost insensible changes which are constantly going on in the modes of business, customs of life, and the moral standards of men, which really make the law ; to catch them at the right point and give them life and efficacy by adapting the law to them." ¹

Besides such continual, though not always conscious adjustment of law to custom, there are two important instances in comparatively recent times, of the enlargement of the law by conscious and substantial appropriation from particular bodies of customs. These instances are the recognition and adoption of merchants' customs by the English Common law in the eighteenth century, and the incorporation of miners' customs into the law of California in this century. These mining customs, by reason of the fact that the mining laws of California were generally adopted by our other

¹ *Albany Law Journal*, vol. lvi., p. 445.

Western mining states and territories, and that the miners' customs were recognized and allowed by act of Congress in 1866, became the basis of our American mining law. Judge Sanderson, in his opinion in *Morton v. The Solambo Mining Co.*, 26 Cal. 527, describes the origin and operation of these customs: "[Before 1851] there had sprung up throughout the mining regions of the state local customs and usages, by which persons engaged in mining pursuits were governed in the acquisition, use, forfeiture, or loss of the ground. . . . These customs differed in different localities, and varied to a greater or less extent according to the character of the mines. . . . They were few, plain, and simple, and understood by those with whom they originated. . . . These usages and customs were the fruit of the times and demanded by the necessities of communities, who, though living under the Common law, could find therein no clear and well-defined rules for their guidance applicable to the new conditions by which they were surrounded, but were forced to depend upon remote analogies of doubtful application and unsatisfactory results. . . . These customs and usages have in progress of time become more general and uniform, and in their leading features are now¹ the same throughout the

¹ 1864.

mining regions of the state." The California Practice Act of 1851 had recognized these customs and had directed their adoption as law wherever not in conflict with the constitution or laws of the state. In *Harvey v. Ryan*, 42 Cal. 626, it is said that these customs are none the less effective when they are unrecorded, and that the question merely is, what is the custom?

Development of the Doctrine of Stare Decisis.—Returning now to a consideration of the course of the Common law in England, we find in the reign of Edward I. the indications of a feature which was to become the most striking characteristic of our Common law to-day—pleaders and judges had begun to cite previous cases.¹ But not then, nor for a long time afterward, did a court, as is the practice nowadays, consider previous cases as of binding authority, and resort to them at once for some rule to apply to the case in hand. Our usual modern way is to revert, first of all, to previous cases as binding authorities, and then, perhaps, supplement that argument with one "on the principle of the thing," for the purpose of

¹ Mr. Harwood, editor and translator of the Year-Books, says in his preface to the volume containing the years 34 and 35 of Edward I., that "a tendency to rely on previous cases appears in this volume. There are more than a dozen instances of reference to previous cases."

fortifying the authorities cited as precedents. Our point of view in these days is indicated by a statement of this sort : " If we turn from this examination of adjudged cases, which largely preponderate in favor of the doctrine . . . to look at the question in the light of reason, that doctrine commends itself to us still more strongly." ¹ But we are to think of the earlier method as being rather a discussion of the principle of the thing, the argument being supplemented, though it seems but infrequently, by reference to previous cases as illustrations of the practical working of the principle.²

The courts did not, perhaps, think it necessary that they should be reminded of previous decisions. The Common law was early given into the keeping of a small body of judges and lawyers, who cherished it as something among themselves alone, and only to be understood by them. Its traditions were passed down from generation to generation, and a knowledge of it was only to be acquired by long years of novitiate. " The English Common law was tough, one of the toughest things

¹ *Lovejoy v. Murray*, 3 Wall. 1, 16.

² See Pollock and Maitland, *History of English Law*, vol. i., pp. 162, 163 ; Markby, *Elements of Law*, 5th ed., § 91 ; Reeves, *History of English Law*, Finlason's ed., Amer. issue, 1880, vol. iv., pp. 154, 155 ; Maitland's ed. of *Bracton's Note-Book*, Introd., p. 11.

ever made.”¹ Those who knew it, knew it thoroughly, but knew nothing else; and to those thus saturated with its spirit, reason, and methods, the citation of previous cases was not of the prime importance that it is to-day.²

Besides, it was not so easy to cite precedents. The only Reports before the latter half of the sixteenth century were the Year-Books, of which the first comes from the reign of Edward I. and the last from the reign of Henry VIII. The Year-Books contain a record of the oral discussion of the points involved in the case, with the decision, but in them the citation of previous cases is infrequent.³ In the sixteenth century the unofficial publication of Reports by individuals was begun,⁴ but many of the Reports of that period were of doubtful accuracy, and some, perhaps,

¹ Professor F. W. Maitland, in Traill's *Social England*, vol. ii., p. 481.

² *Ibid.*, pp. 479-481; Pollock and Maitland, *History of English Law*, vol. i., p. 163; Maine, *Ancient Law*, 3d Amer. ed., pp. 12, 13; Markby, *Elements of the Law*, 5th ed., § 90.

³ It has been pointed out that probably in the time of the later Year-Books the citation and influence of previous cases was more usual than those reports indicate. Markby, *Elements of Law*, 5th ed., § 90.

⁴ At the present time the English Reports are published under the auspices of an association of lawyers and with the supervision of eminent members of the profession.

were wholly unauthenticated.¹ However, from the end of the sixteenth century the practice of citing cases became more common, and at least by Blackstone's time, in the last half of the eighteenth century, courts had gradually come to look upon previous decisions as we do to-day ;² the Common law had become case law, and the courts regarded the previous cases as of binding authority, and not merely as illustrations of the custom of the court.³ The Common law now had reached the period when it was to progress by the judicial interpretation of previous cases regarded as of binding authority.⁴

Influence of Roman Law in England.—Two great systems of law prevail in the civilized world : the English Common law and equity in Great Britain (except Scotland), in the

¹ Wallace, *The Reporters*, in his "Preliminary Remarks." He suggests that as a means of escape from following precedents, the judges may sometimes have unfairly criticised and refused to allow the value of some of the cases in these Reports.

² Blackstone's *Commentaries*, Book I., pp. 70, 71.

³ The Reports that had been published down to Blackstone's day were, as we look at them now, comparatively few. Down to 1776 the total number of English Reports, both law and equity, would not much exceed 150 volumes. Wallace, *The Reporters*, in his "Preliminary Remarks."

⁴ See Appendix for examples of English law reporting at different periods.

United States (except Louisiana),¹ and generally in the numerous English colonies scattered over the globe ; the Roman or civil law² in the other countries of Western Europe and in the countries colonized by them. In concluding this sketch of the course of English law, it is, therefore, well to note the influence that the Roman law has had upon English law. In speaking of the Roman law, one usually has in mind that law as it was compiled into the Code, Institutes, Novels, and Digest or Pandects, under the auspices of the Emperor Justinian ; but in considering its influence, we must distinguish between that of a direct kind which comes from a study of this compilation, and such indirect influence as comes from the adoption of customs or institutions in which the Roman law is active. Its traceable effects upon English law do not begin until after the Anglo-Saxon Conquest. During the Anglo-Saxon period its indirect influence was operative, and in two ways : first, through the introduction of the Roman Church, bringing with it the elements of what in course of time was to develop into the system of canon or church law ; second, and at a later period,

¹ The basis of the law in Scotland and Louisiana is the civil law.

² Civil law is a term also used in another sense, to distinguish that part of the law which is not criminal law.

through the intercourse of the English princes with the Frankish kings, whereby Roman materials that had existed among the Franks were brought into England.¹

After the Norman Conquest the Roman influence continued. The Normans adopted the official machinery of the Frankish Government, including such Roman elements as had been taken up by the Franks, chiefly matters of procedure. In the twelfth and thirteenth centuries there was a revival of interest in Roman law, and a direct study of the Justinian compilation, a fact which for about a century worked some modifications in English law. The greatest effects, however, came through the Roman Church and its clergy. The Church "being a Roman institution lived Roman law." She dissuaded her members from going to law. The Christian emperors had allowed her certain judicial powers; she had her ecclesiastical courts; there grew up a system of canon law administered in them; and she had such courts and law with her in England. In the twelfth century the relation of the canon law to Roman law was very close, and from the latter the canon law had borrowed its form, language, spirit, procedure, and many maxims. In the twelfth and thir-

¹ Pollock and Maitland, *History of English Law*, vol. i., Introduction.

teenth centuries the king's justices were also prelates of the Church, and must have had an acquaintance with the methods and general principles of the canon law. At that time "it is by 'popish clergymen' that our English Common law is converted from a rude mass of customs into an articulate system, and when the 'popish clergymen,' yielding at last to the Pope's commands, no longer sit as the principal justices of the king's court, the golden age of the Common law is over. . . . English law, more especially the English law of civil procedure, was rationalized under the influence of the canon law." ¹ Before the end of the reign of Henry III. most of the king's justices were no longer clergymen, and by the fourteenth century the Common law judges were probably ignorant of the canon and Roman law.²

As to the ecclesiastical courts, with their canon law, they continue to exist in England to the present day. Formerly they had jurisdiction not merely over matters of what we would consider strictly ecclesiastical interest, but also over marriage and divorce, probate of wills, and administration of goods left by persons dying intestate. They are now,

¹ Pollock and Maitland, *History of English Law*, vol. i., pp. 112, 113.

² *Ibid.*, Introduction, and pp. 88-96, 111, 184.

however, confined to affairs of a purely ecclesiastical character. In 1857 their jurisdiction in regard to wills, and personal property of intestates, was given to a new court of Probate ; and their jurisdiction over divorce was given to a new court for Divorce Causes. Ecclesiastical courts form no part of the judicial establishment in the United States.

Although after the thirteenth century no other wave of Roman influence affected the law administered in the Common law courts, the Roman system did, however, affect two other jurisdictions in England—the Admiralty courts and the Court of Equity. Both of these jurisdictions adopted the reason, spirit, and procedure of the civil law. The law administered by Courts of Admiralty is the *Maritime law*, which may be called a common law of the seas. Its rules and principles may be found in several codes compiled for various seagoing peoples,¹ and in England and the United States these rules and principles have worked themselves into the series of decisions rendered by admiralty courts.² As to the in-

¹ The codes are those of Rhodes, Amalfi, Oleron, Wisby, the Hanseatic towns, and the codes known as the Consolato del Mare, the French marine ordinance of 1681, and the Black Book of the Admiralty.

² In the United States admiralty is a matter of federal jurisdiction, though the state courts have concurrent jurisdiction over some cases of a maritime nature.

fluence of the Roman system upon the Court of Equity, there is some diversity of opinion, but it is agreed that its procedure and a number of its rules were derived from that system. All of the chancellors down to the time of Henry VIII. were ecclesiastics, and it would not be strange if, before the period when the Court of Equity became more strictly bound by precedents, any chancellor who was familiar with either the Roman or canon law did, upon occasion, avail himself of that knowledge. But a recent authority thinks that the influence did not go much beyond giving the procedure and some maxims: "So far as we can now see, the chancellors seem to get most of their dominant ideas from the Common law. They imitate the Common law whenever they can, and depart from it reluctantly at the call of natural justice and common honesty."¹

To sum up: We have now discussed briefly (1) how the unenacted law operates in this country to-day; (2) how it came to us from England; and (3) the course of its growth there, and in what manner it was influenced by that other great system of law which shares with it the dominion of the civilized world.

¹ Professor F. W. Maitland, in *Traill's Social England*, vol. ii., p. 488.

IV.

COURTS AND PROCEDURE.

The Courts.—In describing the boundaries of law, it was said that those rules of which the state will compel the observance constitute the law ; and it was added that the state establishes courts for the purpose of administering those rules, and provides methods for enforcing the orders and judgments of the courts.

The State Courts.—The ordinary courts of the several states of the Union may differ in name, in number, and in the powers they exercise. But although such differences exist, almost every state in establishing its courts provides :

1. A high court of appeals for the review of cases and the correction of the errors of lower courts.

2. A court or courts having general, original jurisdiction over Common law cases.

3. A court or courts having general, original jurisdiction over equity cases.

4. A court or courts having original jurisdiction in all probate matters—*i.e.*, the settlement of the estates of deceased persons.

5. Courts for the adjudication of minor criminal cases and civil cases involving small amounts.

This does not mean that a state establishes separate courts for each of the five several purposes just given ; it means that the state has those general purposes in view in establishing its courts. The following chart will show, by way of illustration, the courts whereby, in some of the states, the purposes above mentioned are subserved.¹

	1. Highest Appellate Court.	2. Court of General, Original, Common Law Jurisdiction.	3. Court of General, Original, Equity Jurisdiction.	4. Court of Original Probate Jurisdiction.	5. Court for Minor Cases.
California.	Supreme Court.	Superior Court.	Superior Court.	Superior Court.	Justice's Court.
Kansas....	Supreme Court.	District Court.	District Court.	Probate Court.	Justice's Court.
Maryland.	Court of Appeals.	Circuit Court.	Circuit Court.	Orphans' Court.	Justice's Court.
Mississippi	Supreme Court.	Circuit Court.	Court of Chancery.	Court of Chancery.	Justice's Court.
New York.	Court of Appeals.	Supreme Court.	Supreme Court.	Surrogate's Court.	<i>Criminal:</i> Court of Special Sessions. <i>Civil:</i> Justice's Court.

¹ A chart for all the states is given in Stimson's *American Statute Law*, vol. i., p. 114.

Besides these typical courts which appear in the chart, there may be in any state additional courts having jurisdiction limited as to locality or as to the kind of matters that can be adjudicated in them. For example, in New York there are, among other additional courts, an intermediate court of appeals, called the Appellate Division of the Supreme Court, and a County Court for each county except New York County.

The Federal Courts.—The courts of the United States are the Supreme Court, a Circuit Court of Appeals for each of the nine federal judicial circuits into which the country is divided, and a Circuit Court and a District Court for each of the numerous federal judicial districts into which the country is divided.¹ The Supreme Court is the highest federal court of appeals for the correction of errors, the Circuit Courts of Appeals are intermediate appellate courts, and the Circuit Courts and District Courts are courts of original, but limited jurisdiction.²

The English Courts.—In England there are two courts of final appeal, the House of Lords

¹ There are at present seventy such districts.

² The best book for students upon the subject of the jurisdiction of the federal courts is the *Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States*, by B. R. Curtis. 2d ed., 1896. (Students' Series.)

and the Judicial Committee of the Privy Council, each having its own appellate jurisdiction. The other ordinary superior courts are consolidated into one Supreme Court of Judicature, consisting of two great divisions, the Court of Appeal and the High Court of Justice. The Court of Appeal is an intermediate appellate court, the High Court of Justice is the court of general, original jurisdiction in Common law, equity, probate, divorce, and admiralty matters. The High Court of Justice consists of three divisions—the Queen's Bench Division, the Chancery Division, and the Probate, Divorce, and Admiralty Division. Besides the above superior courts, there are also County Courts and other courts of inferior jurisdiction.¹

Procedure.—It is evident that the proceedings of the courts and of all those charged with the execution of its mandates must be orderly and regular. It is for this reason that there exist rules of Procedure, which constitute a large part of the bulk of the law.²

¹ See also upon the English courts *ante*, pp. 63, 73. An excellent account of the English courts is given in Anson's *Law and Custom of the Constitution*, Part II., 2d ed. (1896), pp. 431-480.

² It has been stated that almost one half of the *points* decided in the cases digested in the annual *General Digest* for 1893 were "points of procedure or other matters not involving the merits of the controversy." *Reports of the American Bar Association for 1894*, pp. 366, 367.

The general principles which underlie the rules of Procedure are :

1. That, assuming there is some legal remedy open to the complainant, the remedy must be sought in a court which, by law, is given power to administer the remedy.

2. That the court which has power to administer the remedy must acquire jurisdiction over the parties to the controversy in a proper manner. The jurisdiction of a court over a complaining party is obtained by his resorting to the court for a legal remedy ; the jurisdiction over the defendant is obtained by reaching out and bringing him into the court by a lawful mandate issued against him by the court.

3. That the precise points in controversy must be ascertained before a decision can be given. It may be that only the facts are in dispute, or it may be that the parties are agreed upon the facts, and that the only matter of difference is as to the rule of law which is properly applicable to the facts. At the beginning of most kinds of legal contention the parties, through their attorneys, arrive at the exact point at issue by a method of statement and counter-statement, technically known as *Pleading*. And the issue thus reached will be either an issue of fact or an issue of law.

4. That judgment must be rendered. If the issue is one as to the facts, the truth of the

matter is, in actions at Common law, ordinarily left for a jury to decide upon evidence submitted to them, and upon the verdict of the jury a judgment is rendered by the court. In equity cases the questions of fact are decided by the court, and not by a jury. But what is to be considered proper evidence is to be decided by the court in accordance with existing legal rules of *Evidence*. If the issue is one of law, the court is to administer the law properly applicable, and to render judgment accordingly. From the decisions of lower courts various provisions must be made for appeals to higher courts in order that the finally decisive judgment may not rest upon errors. This system of appeals results in giving us the final authoritative declarations of the law by courts of last resort, whose opinions are to be found in the Reports.

5. That there must be provision for the enforcement of the orders and judgments of the courts.

The place of Procedure in the scheme of the law has been thus described: "Law defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, . . . it is 'Substantive Law.' So far as it provides a method of aiding and protecting, it is 'Adjective Law' or Procedure."¹

¹ Holland, *Jurisprudence*, 5th ed., p. 77.

APPENDIX.

THE following cases are brief examples of the progress of law reporting from the time when precedents were rarely cited to the time when they had come to be regarded as binding authorities. The first is from Horwood's edition of the *Year-Books* of 34 and 35 Edward I., p. 512, the date of the case being the year 1307.

“Walter le Gleuman and John le Gleuman purchased, etc., jointly, etc., and then jointly alienated and died; and after their deaths Alice, etc., the wife of Walter and Agnes, etc., the wife of John brought their writ, etc. — *Hedone* (to each plaintiff separately). Your husband, etc., was never solely seised, etc., so that, etc., but jointly, etc.; and he disclosed the facts of the case. — *Lanfar*. You have acknowledged that he was seised in his demesne as of fee, etc., judgment, etc.; and as to Agnes, in order better to affirm her estate, we tell you that John her husband survived, etc. — MALLORE. According to what he says, they had previously jointly alienated; and if that be true, John was not solely seised of any-

thing.—And he said to *Lanfar*, Is it as he says or not?—*Lanfar* could not deny this.—MALLORE (having consulted HENGHAM and STAUNTON). The court adjudges that neither one nor the other takes anything, etc.”

The second example, *Belly v. Algor*, is taken from *Dyer's Reports*, 206a, the date of the case being the year 1561. A case from this reporter is selected because his are among the earliest of the Reports which succeeded the Year-Books.

“ Note, That this Term an outlawry of one *William Algor* at the suit of *William Belly* and others was reversed on good consideration in the Bench without writ of error, because these words usually put in the writ of proclamation, s. ‘*made upon three several days whereof one proclamation,*’ etc., were omitted by the negligence of the exigenter, who was *Scrogges* and his clerk, whereby the writ did not bear any sense according to the intent of the statute 6 H 8, and a precedent of reversal was shewn—namely H 8. *Rotulo* was seen, because the writ of proclamation did not make mention to what sheriff the defendant should render himself, etc. See East. 4.”

The third example, *Rex v. Beach*, selected from *Cowper's Reports*, p. 229, was decided in

1774, and brings us to the period when our present method and purpose of citing preceding cases had been established.

“ The defendant in this case had been convicted of perjury in an affidavit. Upon shewing cause why the judgment should not be arrested, exception was taken by Mr. *Dunning* and Mr. *Buller*, in support of the rule, that there appeared a material variance between the indictment and the affidavit; for in the affidavit the defendant swore, that ‘ he understood and believed,’ etc., whereas the assignment of the perjury in the indictment was ‘ that he had falsely sworn that he understood and believed,’ etc., omitting the letter *s*.

“ In support of this exception it was insisted that this being a variance in the material part of the charge—namely, in the assignment of the perjury itself, was fatal, and could not be cured by verdict; and cited *Queen v. Drake*, 2 Salk. 660.—Hutton, 56; Cro. Jac. 133; 5 Rep. 45; 2 Lord Raym. 1224. *Cur advisare vult.*

“ Lord *Mansfield* now delivered the unanimous opinion of the court as follows: ‘ This was a motion in arrest of judgment on an indictment for perjury in an affidavit, upon the ground of a material variance between the affidavit and the indictment, the letter *s* being left out in the word understood; and it comes before the

court after the jury have read it “ understood.” We have looked into all the cases upon the subject, some of which go to a great degree of nicety indeed, particularly the case in *Hutton* 56, where the word *indicari* was written for *indictari*; whereas it should have been written with an abbreviation *indīcari*; but that case is shaken by the doctrine laid down in 2 *Hawk.* 239. The true distinction seems to be taken in the case of the *Queen v. Drake*, 2 *Salk.* 660, which is this: that *where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material.* To be sure, a greater strictness is required in criminal prosecutions than in civil cases, and in the former a defendant is allowed to take advantage of nicer exceptions. But this is a case where the matter has been fairly tried, and where the omission of the letter *s* certainly does not change the word. Therefore we are all of opinion that the jury were very right in reading it “ understood.” ”

“ Rule for arresting the judgment discharged.”

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